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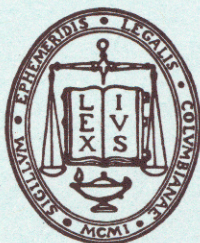
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VOTERS' RIGHTS AND PARTIES' WRONGS: EARLY POLITICAL PARTY REGULATION IN THE STATE COURTS, 1886–1915

Adam Winkler*

Departing from the traditional focus in election law on twentieth century federal electoral regulation and federal court decisions, Adam Winkler examines the very first cases to decide the constitutionality of regulations governing political parties: those arising in the state courts from the 1880s to the 1910s. In these cases, judges first confronted—and rejected—the argument that political parties were private voluntary associations immune from state regulation. Courts relied instead on a framework that melded an expansive understanding of the individual's right to vote, which included access to nomination practices and a say in party governance, with a profound fear of the corruption of party leaders, who were blamed for the chaos, violence, and fraud of late nineteenth century elections. The impact of this history of the state court response to party and ballot reform on current electoral controversies—such as two-party entrenchment—and scholarly debates relating to the structure of political parties, the conservative character of Progressive era courts, and state-building is also assessed.

INTRODUCTION

Election law scholars have paid insufficient attention to state court adjudication of laws regulating electoral politics. The focus has been on federal law and U.S. Supreme Court decisions, even though each of the fifty states has its own set of detailed election regulations. Not only is state law a diverse, plentiful, and untapped lode for study, but state courts have historically exercised the responsibility to decide the constitutionality of state-level electoral reforms prior to the federal courts. It is to the state courts, therefore, that one must often look to discover the doctrinal foundations of election law, laid by state judges when first confronted with challenges to reforms.

Legal scholarship in one area of election law, political party regulation, has been dominated by the question of whether parties are associations and therefore entitled to some level of immunity from regulation on the basis of the freedom of association. Yet, reflecting the common myopia, scholars have analyzed this question by looking solely to federal court cases decided in the twentieth century.¹ Lost in these discussions

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1. See, e.g., David K. Ryden, Representation in Crisis: The Constitution, Interest Groups, and Political Parties 145–65 (1996); John G. Kester, Constitutional Restrictions on Political Parties, 60 Va. L. Rev. 735 (1974); Daniel Hays Lowenstein, Associational Rights of

are the very first judicial decisions to address the associational rights of political parties: those arising in the state courts around the turn of the twentieth century.² The purpose of this Article is to explore and explain the early political party cases—and by doing so, uncover the heretofore unrecognized state-law cornerstones in the legal jurisprudence of political party regulation.

While the Framers, most famously Madison, the author of *The Federalist* No. 10, believed a chief advantage of the Constitution was its inhospitality to political parties or “factions,” they also enshrined in the Bills of Rights of state and federal constitutions protections for the freedom of association or “assembly.” Not only were the Framers startlingly wrong about the faction-reducing effects of their handiwork, but the political parties that grew to enormous influence in the nineteenth century³ and their candidates have since used the guarantee of freedom of association to argue for immunity from state regulation. The associational rights argument was initially attempted in the state courts in the 1880s and 1890s, when states for the first time explicitly regulated political parties. This early regulation mandated parties to adopt specific candidate nomination practices (such as primaries or caucuses) and internal party governance structures, and established party membership rules and ballot access qualifications. Party regulation pulled the traditional authority over party organization and governance away from local party machines and placed it in the hands of the state.

This study examines how the first courts to review turn-of-the-century party regulation responded to this reconstitution of authority over party matters and explains why those responses took the form they did. Between 1886 and 1915, courts by and large rejected the contention that parties were private, voluntary associations entitled to autonomy. Instead, in adjudicating electoral reforms, courts emphasized “voters’ rights”—i.e., the right of individuals to an effective, meaningful, and useful ballot

Major Political Parties: A Skeptical Inquiry, 71 Tex. L. Rev. 1741 (1993); Clifton McCleskey, Parties at the Bar: Equal Protection, Freedom of Association, and the Rights of Political Organizations, 46 J. Pol. 346 (1984); Gary L. Scott & Craig L. Carr, Political Parties Before the Bar: The Controversy Over Associational Rights, 5 U. Puget Sound L. Rev. 267 (1982).

There are, of course, exceptions to the dominant emphasis of federal law in election law research, and the growing literature on state campaign finance reform in particular is encouraging, see, e.g., Michael J. Malbin & Thomas L. Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* (1998) (analyzing the effectiveness of state campaign finance laws from the 1970s to the 1990s).

2. The Progressive era party cases reveal the error of scholarly claims that “[t]he right of association was first invoked in the context of candidate access to the ballot in *Williams v. Rhodes* . . . in 1968.” Ryden, *supra* note 1, at 146.

3. The United States in the nineteenth century has been characterized as a “state of courts and parties.” Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920*, at 19–46 (1982).

and to an orderly and clean electoral process.⁴ Courts were not merely deferential to state legislatures; some courts invalidated filing fees, candidate oath requirements, and even entire primary schemes. Judicial decisions turned instead on the extent to which reforms were perceived to advance or inhibit the rights of voters, while those of parties were minimized.

Indeed, judges were hostile to party associational rights chiefly because of the late nineteenth century experience with fraudulent elections corrupted by local party bosses and machines. Although we are often reminded that ballot reform was a reaction to late nineteenth century electoral corruption, less well recognized is how closely contemporaries attributed corruption specifically to party leaders. When party leaders asserted associational rights in an effort to defeat state electoral reforms, the courts imagined party elites not as rights-holders worthy of respect, but as the very problem necessitating reform. The opinions of this era reveal how party leaders were blamed for the corruption of the ballot box, thereby dooming the claims of parties to associational freedom.

Part I of this Article introduces and analyzes the first judicial decisions on political party regulation. Although initially viewed as private associations akin to corporate entities, political parties by the 1890s came to be viewed by the courts as state agencies whose purpose was to advance the interests of voters. In addressing the constitutionality of internal party governance laws, ballot access requirements, fusion bans,⁵ filing fees, candidate oath requirements, and party membership rules, state courts adopted an expansive conception of the individual's right to vote that included the ability to participate freely in party nomination and governance processes. Fueled by fear of party corruption, courts disregarded the interests of party leaders—both organizational leaders, like local machine bosses, and candidates—and upheld reforms to the extent they advanced an expansively defined right to vote. This Part also shows how the outer boundary of the courts' concern with voters' rights was marked by an unwillingness on the part of judges to become entangled in internal party disputes over doctrine and ideology.

Part II suggests how courts could uphold party reforms in the name of voters' rights even though those reforms would ultimately prove to minimize electoral competition and thereby lessen voter choice. This Part also places early party reform and the judicial response thereto within current scholarly debates over the nature of political parties, the role of the courts as a bulwark against progressive reform, and the turn-of-the-century national state-building.

4. Several scholars have recognized the fissure between voters' rights and those of parties, but only in the context of modern, U.S. Supreme Court political party jurisprudence. See, e.g., Ryden, *supra* note 1, at 146–65; Mark E. Rush, *Voters' Rights and the Legal Status of American Political Parties*, 9 J. L. & Pol. 487, 487–88 (1993).

5. Fusion occurs when two parties nominate the same candidate to represent them. For further discussion, see *infra* notes 68–79 and accompanying text.

I. VOTERS' RIGHTS & PARTIES' WRONGS

For most of the nineteenth century, parties operated without any legal recognition or restriction. Party organizations, the descendants of local, elite clubs, chose their own nominating procedures and established their own bodies for internal governance. Not only did they operate outside of the recognition of state or federal law, they remained primarily local units without a national or even much regional infrastructure. According to historian Robert Wiebe:

Parochialism split the major parties into a myriad of little units that no one had the capacity—or even the inclination—to combine. Like the society that produced them, the parties lacked a central nervous system. . . . Feeble national committees had neither the resources nor the prestige to conduct campaigns. Each candidate managed his own affairs⁶

At the local and state level, local party groups, led in urban areas by ward bosses, set the requirements for access to caucuses, conventions, and primaries to select convention delegates.⁷ There was no official ballot—voters or parties prepared their own—and no official list of candidates, leaving nomination completely unregulated.⁸ As political scientist V.O. Key described, “[i]t was no more illegal to commit fraud in the party caucus or primary than it would be to do so in the election of officers of a drinking club.”⁹

Between 1882 and World War I, state legislatures across the country adopted “Australian” (i.e., state-printed, secret) ballot and party primary laws to regulate general elections, party nominating procedures, and the internal governance structure of parties. These laws provided standards for recognizing political parties, granted automatic ballot access to the most popular parties, and required minor candidates to petition for ballot access. States set the procedures for nominating conventions, and mandated primary elections first for delegates, then for nominees directly. The laws provided for filing fees, fusion bans, and affiliation oaths, and barred parties from setting their own qualifications for membership. States established central and county committees to govern the parties, requiring the election of committeemen and setting the terms and duties of their offices. Although there was variation among states—Republican-led states like Illinois, Pennsylvania, and Kansas banned fusion, while several Southern states limited primaries to white men—the core reforms of

6. Robert H. Wiebe, *The Search For Order, 1877–1920*, at 28 (1967).

7. On the history of nomination practices and the role of local party leaders in controlling them, see Theodore W. Cousins, *Politics and Political Organizations in America* 340–50 (1942).

8. See Eldon Cobb Evans, *A History of the Australian Ballot System in the United States* 9, 14 (1917); John F. Reynolds & Richard L. McCormick, *Outlawing “Treachery”: Split Tickets and Ballot Laws in New York and New Jersey, 1880–1910*, 72 *J. Am. Hist.* 835, 836 (1986).

9. V.O. Key, Jr., *Politics, Parties, and Pressure Groups* 411 (4th ed. 1962).

party recognition, mandatory nominating procedures, and ballot access were nearly universal.¹⁰

Party reform was not just the inevitable result of the nineteenth century pattern of expansion of the democratic electorate, although its populist elements might appear to support that conclusion. In fact, party reform was a challenge to the prevalent governmental order in the states—an order that was based on strong local party machines fed by the spoils system and controlled by bosses.¹¹ Revolution, not evolution, is the apt metaphor. Party reforms sought to deprive local bosses of control over elections, and thereby diminish bosses' ability to leverage their influence over electoral outcomes to secure post-election indebtedness and loyalty. By providing for an official ballot and establishing rules of access, reforms limited the traditional power of local machine bosses to use armies of party workers to prepare and distribute ballots, and to dictate which candidates would be nominated. In short, party reforms sought to "neutralize this motor force of the established mode of governmental operations"¹²—that is, neutralize local, boss-led party machines by institutionalizing the electoral process and giving the state regulatory authority over political parties.

Constitutional challenges to these reforms arose precipitously, propelled by the inevitable turning of the election cycle. Candidates and party officers adversely affected by the new laws argued in court that the reforms were unconstitutional on the basis of state constitutional guarantees.¹³ Some challenges were primarily procedural, such as those in California in 1896, Missouri in 1900, and New Jersey in 1903,¹⁴ where plaintiffs argued that the laws did not meet regularities in enactment, such as the "single subject" rule, or amounted to "special" or "class" legislation.¹⁵

10. The first mandatory party regulations, other than criminal bans on fraud in primary elections, were enacted by New York in 1882. Like most of the early reforms, they applied only to the most populous cities in the state. The reform movement gathered such steam that by 1899, two-thirds of the states had primary legislation. See Charles Edward Merriam & Louise Overacker, *Primary Elections* 18, 38 (rev. ed. 1928). By 1905, 43 states had enacted some form of primary election law. See Floyd R. Mechem, *Constitutional Limitations on Primary Elections Legislation*, 3 Mich. L. Rev. 364, 381–86 (1905). The extent to which partisan motivations or the election of judges influenced the enactment of reforms or their judicial outcome remains unclear. Yet the wide spread of these reforms and the relative homogeneity of judicial responses suggest that partisan self-interest and judicial electoral accountability were not determinate factors.

11. See Skowronek, *supra* note 3, at 48 (describing opposition to the "constituent party machine").

12. Cf. *id.* at 53 (describing the motive behind Gilded Age civil service reform).

13. As a commentator noted in 1905, "Since the federal government has no distinct body of voters of its own, the whole matter [of primary laws] must be controlled by the State constitutions . . ." Mechem, *supra* note 10, at 365.

14. See *Marsh v. Hanley*, 43 P. 975 (Cal. 1896); *State ex rel. McCaffery v. Mason*, 55 S.W. 636 (Mo. 1900); *Hooper v. Stack*, 56 A. 1 (N.J. 1903). See also *Ladd v. Holmes*, 66 P. 714 (Or. 1901); *State ex rel. Arnold v. Mitchell*, 104 P. 791 (Wash. 1909).

15. As part of the post-Civil War attempt to purify politics from the corruption of legislators, who were thought to favor private interests and use the legislative process in

More often, challenges were substantive, directly assaulting state regulations as violative of political parties' freedom of association or of the promise of "free and equal elections."

In an 1886 advisory opinion, the Colorado Supreme Court described the questions posed by the newly emerging party regulation:

(1) Is it constitutional to enact any law attempting to regulate the machinery of a political party in making nominations of candidates for public offices? (2) Can the law take any cognizance of political parties as such? (3) Can the law interfere in any wise with the modes and methods employed by a political party in the nomination of its candidates for public office? (4) Are the provisions of the bill properly the subject-matter of legislation?¹⁶

Like state courts throughout the nation, the Colorado court would answer these questions in the affirmative, recasting parties from private voluntary associations controlling their own internal procedures to quasi-state agencies regulated to serve public political interests.

A. Private Parties, the Corporate Analogy, and Internal Party Governance

Prior to the late 1880s, an associational conception of political parties seemed to have promise as a bulwark against state encroachment into party matters. When California enacted the first statutory recognition of political parties in 1866—a purely optional set of nominating procedures parties could choose to follow—the title of the bill was "An Act to Protect the Elections of Voluntary Associations and to Punish Frauds Therein." Early court opinions in several states had cast party nominating processes as private matters. The Pennsylvania Supreme Court, for instance, refused the commonwealth's effort to recover money wagered on the outcome of a primary election for a Greene county state senator under a law requiring forfeiture of money gambled on "any election held under the constitution."¹⁷ Because party primaries did not select "public officers" but merely candidates, the court declared, primary elections were more akin to a "meeting of citizens" or "the election of officers for a private corporation" than a general election and hence were beyond the purview of the statute.¹⁸

misleading ways, state constitutions were amended or new constitutions adopted to include procedural requirements on legislation. These limits on the otherwise plenary state legislative authority included titular rules (requiring that all provisions of a law correspond to the law's official title), single subject rules (prohibiting legislation touching on two or more unrelated topics), and rules against "special" or "private" legislation (mandating that laws apply generally and not only to particular private interests). See, e.g., Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 17 *Publius* 91 (1987); Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 *Minn. L. Rev.* 389, 390–92 (1958).

16. *In re House Bill No. 203*, 21 P. 474, 474–75 (Colo. 1886) (advisory opinion).

17. *Commonwealth v. Wells*, 1 A. 310, 311 (Pa. 1885).

18. *Id.*

Challengers to early regulation of party matters often used the analogy of the corporation in claiming private associational rights. A standard feature of the new election law was the legislative creation of general and county party committees, which were elected to oversee and manage party affairs. These statutes established the offices of committeemen, provided for their means of election, length of tenure, and duties of office. Not only did state courts uphold these laws, they strictly construed the regulations to prohibit party leaders from removing wayward officers—a power one dissenting judge, relying on Chancellor James Kent's famous *Commentaries*, called “an ordinary incident of a corporation.” “Why,” the dissenting judge inquired, “should not the same rule apply to the general committee of a political party?”¹⁹

The corporate model, however, fit uncomfortably at best in the context of political parties. By the late 1800s, the “corporation” had been fundamentally reconceptualized in law from a state-chartered institution designed to pursue public purposes (such as build economic infrastructure, like canals, turnpikes, and bridges) to a private business entity operated to maximize stockholders' returns on investment.²⁰ The corporation had come to be seen as primarily economic in nature, fulfilling private investment objectives. In contrast, at the end of the nineteenth century, political parties were increasingly viewed not as private associations but as agents of the state, whose functions were intimately tied up to the machinery of the state. By 1904, the Wisconsin Supreme Court could justifiably characterize a political party as “by law” made “a state agency.”²¹ Both corporations and political parties were undergoing conceptual transformation, but in opposite directions.

At the level of organizational form, the same state court judges who oversaw the creation of the managerial corporation around the turn of the century did not follow that path with regard to parties.²² To these judges, parties were not to be run, like modern corporations were, by strong autonomous managers more or less immune from oversight of party members (akin to a corporation's increasingly disempowered stockholders). In fact, the election law jurisprudence of the time was fueled by profound distrust of party leaders, viewed to be corrupters of the electorate's will. This pattern of distrust of party leaders and consecration of the rights and interests of voters is evident throughout the party regulation jurisprudence of the era.

This prevalent pattern, and its intersection with the unsuccessful corporate analogy used by regulation opponents, was manifest in *People ex rel.*

19. *People ex rel. Coffey v. Democratic General Committee*, 58 N.E. 124, 128 (N.Y. 1900) (Cullen, J., dissenting).

20. See, e.g., William G. Roy, *Socializing Capital: The Rise of the Large Industrial Corporation in America* 41–77 (1997).

21. *State ex rel. Cook v. Houser*, 100 N.W. 964, 969 (Wis. 1904).

22. On the development of the managerial corporation, see Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* (1977).

Coffey v. Democratic General Committee.²³ The general committee of the Democratic party in Kings County, New York, ousted Michael Coffey, one of its elected members, in March, 1900, accusing Coffey of being the "ring-leader" of a "conspiracy," based on "hostility and disloyalty," "to defeat the regularly nominated candidates of the Democratic party."²⁴ After the lower court refused to order Coffey's reinstatement, the Appellate Division affirmed, calling the party committee a "quasi corporation,"²⁵ which implied the right to remove wayward officers free from state interference. But the New York Court of Appeals, the state's highest court, reversed, adopting a conception of parties quite distinct from the corporation. The 1899 party committee law, according to the Chief Judge Alton Parker, was designed to curb the "not unnatural desire" of party majorities to "perpetuate their power" at the expense of ordinary voting members of the party whose "views were not congenial to the majority"²⁶:

The dominant idea pervading the entire statute is the absolute assurance to the citizen that his wish as to the conduct of the affairs of his party may be expressed through his ballot, and thus given effect, whether it be in accord with the wishes of the leaders of his party or not [T]he scheme is to permit the voters to construct the organization from the bottom upwards, instead of permitting leaders to construct it from the top downwards.²⁷

In Missouri, the Supreme Court rebuffed a party central committee's claim to be "a mere voluntary organization" with the "full power to make and enforce rules" concerning committeemen, announcing that the state's party law was designed

to prevent factional oppressions and outrages in politics, and to lift party management to a plane where it will assist, rather than hinder, the expression of the will of the people Factional party majorities no longer can do as they please, but must recognize and respect the rights of minorities.²⁸

By creating party-governing committees and establishing the election, tenure, and duties of committeemen, state legislation enhanced the authority of voters to select party officials. The ability of party leaders to control the membership of committees, in contrast, was minimized.

23. 58 N.E. 124 (N.Y. 1900).

24. *People ex rel. Coffey v. Democratic General Committee*, 65 N.Y.S. 57, 59 (App. Div. 1900).

25. *Id.* at 63.

26. *People ex rel. Coffey v. Democratic General Committee*, 58 N.E. 124, 125-26 (N.Y. 1900). There is some irony to Parker's suspicion of Democratic party leaders for he would later be the Democratic nominee in the 1904 presidential election against incumbent Republican Theodore Roosevelt.

27. *Id.* at 126.

28. See *State ex rel. Guion v. Miles*, 109 S.W. 595, 598, 603 (Mo. 1908) (quoting *State ex rel. Rudolph v. Witthoeft*, 93 S.W. 284 (1906)).

B. *The Expanding Right to Vote and the Corruption of Party Leaders*

The courts' favorable view of constructing parties from the "bottom upwards" was supported by the growing recognition that the individual's right to vote²⁹ included participation in party nominating procedures and by the fear of the corruption of local party leaders.

Whereas throughout most of the nineteenth century the right to vote was limited to the authority to select government officials on election day, towards the end of the century a broader understanding was taking hold. As early as 1886, the Pennsylvania Supreme Court recognized that "[t]he influence which these primary elections have for good or evil upon the politics of the country is overshadowing."³⁰ In 1893, legal scholar Charles C. Binney argued in the *American Law Register*, among the most influential law journals of the day, that the right to vote extended beyond general elections to involvement in party nominations.³¹ In 1903, Alonzo H. Tuttle, writing in the *Michigan Law Review*, concluded, "The right to nominate is as much a part of the franchise as the right to elect."³² And in 1905, University of Chicago law professor Floyd R. Mechem explained that "the constitutional right to vote involves not merely the right to vote for or against a suggested individual or measure—it involves also the right to propose men or measures [T]he right to vote necessarily

29. Throughout the nineteenth century, and well into the twentieth, the right to vote was lodged in state constitutional guarantees, protected either explicitly by language recognizing the "right to vote" or implicitly by provisions for "free and fair elections." The Federal Constitution, despite its guarantee of a "republican form of government" in Article IV and language recognizing a pre-existing "right to vote" in the Fifteenth Amendment, was held by the U.S. Supreme Court not to "confer the right of suffrage upon any one" in *Minor v. Happersett*, 88 U.S. 162, 178 (1874). To the extent voters' rights were constitutionally secure in the Progressive era, state law was the primary provider of that protection.

The expansion of the right to vote to include nomination should not be confused with an expansion of the sphere of people enfranchised. Indeed, while already enfranchised citizens saw their involvement with nomination processes grow, the late nineteenth century was also marked by a retrenchment in the granting of the basic right to vote. States such as California, Wyoming, Washington, Delaware, and Maine added educational qualifications to the suffrage and New Hampshire and Connecticut toughened existing literacy requirements. See Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* 527 (1977). Although several states allowed resident aliens to vote in the post-Civil War period, around the turn of the twentieth century Florida, Michigan, Minnesota, Alabama, Colorado, and North Dakota abandoned alien suffrage. See *id.* In the South, force, party practices, periodic registration laws, and literacy tests effectively eliminated black suffrage by the dawn of the twentieth century. See generally J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910* (1974). Moreover, one half of the adult population, women, remained disenfranchised throughout most of the nation.

30. *Leonard v. Commonwealth*, 4 A. 220, 225 (Pa. 1886).

31. See Charles C. Binney, *American Secret Ballot Decisions*, 41 *Amer. L. Reg.* 101, 106 (1893).

32. Alonzo H. Tuttle, *Limitations Upon the Power of the Legislature to Control Political Parties and Their Primaries*, 1 *Mich. L. Rev.* 466, 468 (1903).

involves the right to nominate.”³³ The Illinois high court echoed these legal scholars: “The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen, and is of precisely the same nature.”³⁴

This expansive view of the right to vote to include party nomination activities was set in motion by recognition of “safe” electoral districts in which gaining the controlling party’s nomination inevitably meant victory on election day. If, for all intents and purposes, the nomination dictated the outcome of the general election, the right to vote at the general election was rendered functionally irrelevant. “In many portions of the state, as is well known, a nomination by a convention of one of the parties is practically the equivalent of an election. In some instances it is the precise equivalent,”³⁵ wrote the Pennsylvania Supreme Court.

Expansion backwards to party nomination was also necessary to make the right effective in light of the corruption of party leaders who formerly controlled nomination processes.³⁶ If party leaders could easily manipulate the machinery of the party to nominate favored candidates, the ability of voters to have a meaningful say in who gets elected was diminished. As stated elegantly by the Oregon Supreme Court: “Once the stream is polluted at its source, access to its waters, however free, will not serve to purify it.”³⁷

The judicial response to party regulation can only be appreciated fully by understanding how the fear of pollution—the “grave abuse”³⁸ and “evil practices”³⁹ of the late nineteenth century party system—colored judicial decisionmaking. “Under this old system of voting, which was not peculiar to this state, but obtained practically throughout all the states,” the West Virginia Supreme Court recalled, “the door was wide open to fraud, and every election precinct was a scene of confusion and uproar.”⁴⁰ In short, “voting frauds permeated politics in the late nineteenth century.”⁴¹

Foremost among the sources of corruption was the “treachery” of local district leaders and ward bosses who effectively controlled the nomination and balloting process.⁴² Particularly strong in the cities—places of immense late nineteenth century growth as rural Americans migrated *en*

33. Mechem, *supra* note 10, at 367–68.

34. *People ex rel. Breckton v. Board of Election Comm’rs of Chicago*, 77 N.E. 321, 323 (Ill. 1906).

35. *Leonard*, 4 A. at 225.

36. See Tuttle, *supra* note 32, at 468 (noting parties’ control over nomination).

37. *Ladd v. Holmes*, 66 P. 714, 721 (Or. 1901).

38. *Schostag v. Cator*, 91 P. 502, 504 (Cal. 1907).

39. *State ex rel. Bateman v. Bode*, 45 N.E. 195, 196 (Ohio 1896).

40. *Daniel v. Simms*, 39 S.E. 690, 693–94 (W.Va. 1901).

41. Wiebe, *supra* note 6, at 95.

42. See Leon D. Epstein, *Will American Political Parties Be Privatized?*, 5 J. L. & Pol. 239, 244 (1989); Reynolds & McCormick, *supra* note 8, at 837, 843–44.

masse to urban areas that were becoming sites of violence, corruption, and filth in dire need of reform—political bosses organized machines to dole out spoils and bring themselves personal wealth and power.⁴³ Local leaders were responsible for printing up tickets for their party and would often charge candidates to be included on their printed ballots, regardless of party affiliation.⁴⁴ They commonly printed up counterfeit tickets of the other party with substituted names, “so skillfully done at times to deceive even the most careful voter.”⁴⁵ On election day, 1886, *The New York Times* warned that counterfeit tickets “were scattered all over Brooklyn yesterday by various Democratic candidates and Republicans will have to look sharp to-day or they will be casting ballots for their opponents.”⁴⁶ The lack of balloting secrecy begot widespread vote buying by bosses, allowing “soap” instead of authentic support to carry elections. San Francisco’s “Blind Boss” of the 1880s, Chris Buckley, was famous for standing over ballot boxes and distributing “quarter eagles” (gold coins worth \$2.50) to those who voted for his candidates.⁴⁷ As described by one court:

For years political parties were permitted by law to present their candidates in their own way or ways. Charges of deceit and fraud were being constantly heard. The use of money to buy nominations has been charged. Chicanery and trickery of different kinds were not altogether unheard. Political combines were not uncommon, if the repeated charges had any semblance of truth. All these and much more. Such things, to say the least of them, were well calculated to disintegrate state morals, and to breed corruption and official dishonesty.⁴⁸

Because the patronage spoils of victory were substantial, party leaders had every incentive to insure that their candidates were nominated and then elected, even if it meant keeping hostile voters from casting their ballots. When near the turn of the century twenty-five leading New York Republicans investigated their own party’s primary they reported that “frauds in the greatest scale were practiced,” such that the results were “unworthy of serious attention.”⁴⁹ Party primaries fell “so . . . completely under the control of the ‘party’” that the individual voter “no longer [had] any voice in the nomination of candidates.”⁵⁰ Senator George W. Norris of Nebraska advocated the direct primary because it

43. On the consolidation of boss-led urban machines at the end of the nineteenth century, see Wiebe, *supra* note 6, at 30–31.

44. Reynolds & McCormick, *supra* note 8, at 847.

45. Evans, *supra* note 8, at 7.

46. N.Y. Times, Nov. 2, 1886, at 8.

47. See Keller, *supra* note 29, at 523.

48. State ex rel. Dunn v. Coburn, 168 S.W. 956, 957 (Mo. 1914).

49. Quoted in Tuttle, *supra* note 32, at 468.

50. *Id.*

"takes away the power of the party leader or boss and places responsibility for control upon the individual."⁵¹

As the Idaho Supreme Court noted, the "motive" of balloting and party reform was "to protect the citizen in the exercise of the elective franchise from fraud, deception, compulsion, and intimidation."⁵² To the extent that party leaders were the cause of these evils, the courts had no reason to respect their claims of associational rights. Parties, wrote law professor Floyd Mechem in 1905, were "revolutionary and incendiary associations"⁵³ that needed to be curtailed, not protected.

C. Ballot Access Restrictions

Protecting and preserving the ability of voters to make effective use of electoral opportunities free from the corrupting influence of party leaders led most state courts to uphold laws restricting ballot access. The adoption of the pre-printed official ballot necessitated a procedure for determining whose names would be listed. Nearly every state provided automatic listing for candidates nominated by the major parties—defined by receipt of some set percentage of the vote in the preceding election.⁵⁴ Other candidates were required to obtain a specified number of signatures on a petition—a requirement quickly challenged on state constitutional grounds by minor party candidates, such as those from the People's and Prohibition parties.

Courts almost uniformly rejected these challenges,⁵⁵ concluding that ballot access discrimination enhanced individual voter choice and efficacy. *DeWalt v. Bartley*,⁵⁶ decided in 1892, was "the pioneer case on the subject."⁵⁷ Chief Justice Paxson of the Pennsylvania Supreme Court insisted the regulations were necessary lest "the official ballot become the size of a blanket."⁵⁸ If everyone, regardless of popular support, could be listed, there would be "endless confusion"⁵⁹ for the voters. The West Vir-

51. George W. Norris, *Why I Believe in the Direct Primary*, 16 *Annals Amer. Acad. Pol. & Soc. Sci.* 23-24 (1923).

52. *Walling v. Lansdon*, 97 P. 396, 400 (Id. 1908).

53. Mechem, *supra* note 10, at 371.

54. See John W. Epperson, *The Changing Legal Status of Political Parties in the United States* 84 (1986) ("[M]ost Australian ballot laws set out, for the first time, the legal definition of a political party—a requirement that the party poll a certain percentage . . . of the vote in the last election before it could enjoy the privilege of having its candidates automatically listed on the ballot."). By 1895, every state but nine had Australian ballot laws. See *id.* at 82.

55. For a sample, see *State ex rel. Labauve v. Michel*, 46 So. 430 (La. 1908); *State ex rel. Fitz v. Jensen*, 89 N.W. 1126 (Minn. 1902); *State v. Black*, 24 A. 489 (N.J. 1892); *State ex rel. Plimmer v. Poston*, 51 N.E. 150 (Ohio 1898); *Ritchie v. Richards*, 47 P. 670 (Ut. 1896).

56. *DeWalt v. Bartley*, 24 A. 185 (Pa. 1892).

57. Evans, *supra* note 8, at 58.

58. *DeWalt*, 24 A. at 187. See also *Miner v. Olin*, 34 N.E. 721, 722 (Mass. 1893) ("It is plainly impracticable to permit on an official ballot the names for every candidate for office which caucuses composed of two or more voters may nominate.").

59. *State ex rel. Adair v. Drexel*, 105 N.W. 174, 178 (Neb. 1905).

ginia high court warned of the "danger of the voter mistaking or omitting to carry out his real intent by letting him wander and grope through numerous long columns of candidates, covering a large ballot sheet."⁶⁰ "True, a political party cannot be represented as such on the official ballot unless it polled, at the preceding general election, at least two per cent. of the votes cast in the election district," wrote the court that upheld Wisconsin's petition requirements, "but that does not in any manner prevent any voter from voting for any person he sees fit, for any office."⁶¹ In light of the option of voting by write-in or "paster"—a common method of the day by which a voter would glue a piece of paper with a candidate's name to the ballot—petition requirements did not interfere with voter choice. Rather, by making the ballot shorter and less confusing, petition requirements enhanced the usefulness of the ballot and thus maximized voters' ability to choose efficiently and effectively.

Petition requirements further preserved voters' rights by protecting the value of party titles and emblems. In an era rich with minor parties, most of which were disorganized local groups linked far more by ideology than institutional structure,⁶² just about anyone could run for office under the label of the Negro Protective Party or the Socialist-Labor Party. In contrast, the Republican Party and the Democracy⁶³ had long-standing networks of recognized organizations that, however local in character,⁶⁴ could speak with some authority for the respective party in a given ward or district. And turn-of-the-century electoral reforms—by routinizing the process of elections, funding party primaries, and transferring authority away from local party bosses to state-level committees—promised to make the major parties even more accountable.

When confronted with petition candidates claiming the mantles of minor parties, judges, such as those on the Idaho bench, worried that the candidates might be corruptly abusing the ballot procedures. Unlike the major parties, the minor parties generally had insufficient support in prior elections to gain automatic ballot access, forcing them to rely on signature-gathering. Furthermore, the disorganized minor parties often had no formal nomination processes to identify their preferred candidates. As a result, courts were hesitant to allow petition candidates to be listed on the ballot under the name and symbol of a minor party. "To hold that any 150 electors may secure the name of any person they see fit to indorse, to be placed upon the ticket of any party, would, we think, be opening the door to the perpetration of fraud,—would in fact be offering

60. *Morris v. Board of Canvassers*, 38 S.E. 500, 504 (W. Va. 1901).

61. *State ex rel. Runge v. Anderson*, 76 N.W. 482, 486 (Wis. 1889).

62. See, e.g., Wiebe, *supra* note 6, at 84–85.

63. In the nineteenth century, the Democratic Party was often referred to as "the Democracy." On the label "the Democracy" for the Democratic Party, see Robert A. Rutland, *The Democrats: From Jefferson to Carter* 53 (1979).

64. On the localized nature of nineteenth century political parties, see Paul Kleppner, *The Third Electoral System, 1853–1892*, at 79 (1979); Wiebe, *supra* note 6, at 28.

an inducement therefor.”⁶⁵ Although nascent parties might well have preferred to see virtually any candidate enhancing their brands, the threat of party leaders—here, candidates for office—misleading voters was enough to justify the denial of party labels to petition candidates.

G.W. Southall, a candidate for Kentucky’s second congressional district in 1896, discovered how solicitousness for voters’ rights mixed with concerns of party leader fraud when he sued in mandamus to force the clerk of Daviees county court to list Southall as the candidate of the People’s party. Although Southall had obtained signatures from the requisite 400 petitioners, the clerk and then the Kentucky Supreme Court refused to list him with the party label. “[T]he petitioners, as well as the appellant, may be members of another or other parties.” To allow Southall to be listed as a Populist would pose the risk that Populist voters “who are not both intelligent and circumspect would be deceived and defrauded of their right to vote for candidates of their choice.”⁶⁶ In Wisconsin, the Supreme Court insisted that a political party “stands for some distinct policy in public affairs, which is so identified with the party name that its candidates should have the exclusive use thereof.” It was a “matter of the highest importance to the electors to that end that they might not be misled into indorsing principles in form to which they were opposed in fact.”⁶⁷

D. Fusion Bans, Filing Fees, and Candidate Oath Requirements

The framework of voters’ rights/parties’ wrongs also guided judges when adjudicating anti-fusion legislation that prohibited candidates from running under the banner of more than one political party.⁶⁸ By and large, the courts upheld the fusion bans; the rationale of *State ex rel. Runge v. Anderson*⁶⁹ was typical. Multiple party listings alongside a single candidate’s name would lead to “confusion and uncertainty” in the electorate.⁷⁰ Although parties as organizations might be helped by fusion—by forming electoral coalitions with other parties in the minority or attracting voters worried about wasting their votes—the *Anderson* court contended that “[m]ere party fealty and party sentiment . . . are not the sub-

65. *Philips v. Curtis*, 38 P. 405, 407 (Id. 1894). See also *State ex rel. Lewis v. Kinney*, 48 N.E. 942, 942–43 (Ohio 1897) (upholding state’s refusal to list Negro Protective Party candidates under a portrait of Abraham Lincoln because nominations not made through state-wide convention).

66. *Southall v. Griffith*, 37 S.W. 577, 578 (Ky. 1896).

67. *State ex rel. Cook v. Houser*, 100 N.W. 964, 968 (Wis. 1904). See also *Davidson v. Hanson*, 92 N.W. 93, 94–96 (Minn. 1902) (forbidding a political organization from using the word “socialist” next to its candidate on a state ballot to avoid confusion with the established “Socialist-Labor” party).

68. On the partisan motivations behind the adoption of fusion bans, see Peter H. Argersinger, “A Place on the Ballot”: Fusion Politics and Antifusion Laws, 85 *Am. Hist. Rev.* 287, 288–91 (1980).

69. 76 N.W. 482 (Wis. 1898).

70. *Id.* at 487.

jects of constitutional care.”⁷¹ Rather, the state constitution “deals with the individual right of the citizen to vote for the candidates of his choice,”⁷² and from this perspective fusion bans were lawful:

Men are supposed to stand for principles when placed in nomination by political parties, and when the candidates of one party are identical with those of another it is supposed, and not unreasonably, that for the time being at least, though there be two organizations there is but one platform of principles, and that one party designation on the official ballot will satisfy all legitimate requirements of both.⁷³

Echoing *Anderson*, the Illinois high court agreed that ballots were intended to serve voters, not political parties: “The object of the official ballot is not to furnish voters with information as to the persons who are the candidates of their respective parties, or of any party, but to enable them readily to indicate, in the prescribed form, the candidates of their individual choice.”⁷⁴ Single listing of candidates sufficed to meet that objective, protecting the “ignorant and the uninformed” from “fraud and deception.”⁷⁵

Courts upholding fusion bans coupled their concern for voters with suspicion of party leaders and candidates. According to the Ohio Supreme Court, “Certain evil practices had grown up by reason of placing the name of a candidate upon the same ballot more than once, and the general assembly attempted to prevent such practice by providing that the name of each candidate should appear on the ballot but once.”⁷⁶ In Missouri, the court explained at length that:

[T]here is no scheme so fraught with danger of fraud, deceit, dishonesty, corruption, and all similar attendant ills than what is known as the political fusion. It is fraudulent, because fraud is practiced upon the unsuspecting voter by a few political leaders. It is deceitful, because when a candidate of one political faith permits his name to be placed on a ticket under a caption indicating a different political faith, deceit is tolerated and practiced [The ban] will prevent political committees and other political agencies from making corrupt and immoral political fusions in sacrifice of political principles and against the wishes of the masses of their respective parties⁷⁷

71. *Id.* at 486.

72. *Id.* Judges opposed to fusion bans recognized the way in which prevailing doctrine looked only to the rights of voters while ignoring the rights of political parties. See *id.* at 487 (Winslow, J., dissenting); *Murphy v. Curry*, 70 P. 461, 462–64 (1902). *Murphy* stands as the most elaborate and complimentary discussion of parties’ rights—and it was promptly overturned by constitutional amendment. See *Katz v. Fitzgerald*, 93 P. 112, 113–14 (Cal. 1907).

73. *Anderson*, 76 N.W. at 487.

74. *People ex rel. Schnackenberg v. Czarnecki*, 100 N.E. 283, 286 (Ill. 1912).

75. *State ex rel. Sturdevant v. Allen*, 62 N.W. 35, 38 (Neb. 1895).

76. *State ex rel. Bateman v. Bode*, 45 N.E. 195, 196 (Ohio 1896).

77. *State ex rel. Dunn v. Coburn*, 168 S.W. 956, 957–59 (Mo. 1914).

If any trouble at all to voters, the fusion ban was but a "slight inconvenience"⁷⁸ that did not burden their ability to use the ballot as an instrument for selecting elected officials.⁷⁹

Filing fees and mandatory oaths imposed on candidates to enter party primaries were adjudged unconstitutional for inhibiting voter choice, not the right of candidates to run for office.⁸⁰ The problem, according to the Michigan court, was that such pre-election hurdles "preclude[] the voters from choosing as a candidate one who declines to himself seek the office."⁸¹ After recognizing that impact of filing fees on candidates, the Nebraska court struck down that state's filing fee squarely on a theory of voters' rights: the fee, it said, "most seriously interferes with the right of the electorate to freely choose from among those eligible to office whomsoever they may desire, and that this . . . amounts to an unwarranted hindrance and impediment to the free exercise of the elective franchise."⁸² The courts' expansive conception of the right to vote meant that state laws ostensibly regulating candidates had to serve the interests of voters to be constitutionally valid. Mandatory declarations of an intent to run and even reasonably small filing fees unduly inhibited voter choice.

E. *Party Membership Rules*

The judicial emphasis on enhancing the usefulness and effectiveness of voter choice at the ballot box generally led judges to disregard or ignore the associational nature of political parties. Yet even where courts recognized the associational dimensions of parties, those dimensions were refracted through the lens of voters' rights—thereby minimizing the freedoms parties could claim on account of their associational nature. This is evident in the courts' treatment of regulations on who could participate in party primaries. As states required all primary elections to be "conducted at the same time and at the same polling places by one set of public officers,"⁸³ some measure was necessary to ensure that only Democrats voted in the Democratic primary or caucus, only Republicans in theirs. The measure adopted by most regulating states was the affiliation

78. *Bateman*, 45 N.E. at 196.

79. See *State ex rel. Fisk v. Porter*, 100 N.W. 1080, 1081–82 (N.D. 1904) (single listing of candidate does not impair voters' rights). To the extent the courts envisioned voting as an instrumental means of choosing officials, to the derogation of other potential values associated with voting, their effort has been largely copied by the modern U.S. Supreme Court in its enfranchisement decisions. See Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. Rev. 330, 341–63 (1993).

80. See *Dapper v. Smith*, 101 N.W. 60 (Mich. 1904); *State ex rel. Adair v. Drexel*, 105 N.W. 174, 180 (Neb. 1905); *Ballinger v. McLaughlin*, 116 N.W. 70, 71 (S.D. 1908) (fees invalid because "not calculated to prevent fraud, or to protect the rights of honest electors or candidates"); *Johnson v. Grand Forks County*, 113 N.W. 1071, 1074 (N.D. 1907).

81. *Dapper*, 101 N.W. at 61 (referring to candidate oath requirements).

82. *Drexel*, 105 N.W. at 180.

83. *Schostag v. Cator*, 91 P. 502, 503 (Cal. 1907).

oath, which required voters presenting themselves to vote in primaries to swear to support, or to have previously voted for, the particular party's candidates in the general election.⁸⁴ This was the sole test of party membership; parties were strictly prohibited from imposing additional qualifications. As one court recognized, "[t]he regulation of the membership of the party and of the right to participate in the nomination of its candidates, in this respect, is taken from the party and placed in the control of the Legislature."⁸⁵

State courts upheld affiliation oaths, viewing them as little or no inhibition on the ability of voters to make effective use of their expansive right to vote. The Oregon Supreme Court, while asserting that the right to vote included the "choice by party members of the delegates . . . to select partisan candidates," upheld affiliation oaths because "the right of the adherents of the respective parties to assemble and consult together for their common good [was] in no way impinged upon."⁸⁶ Voters "[could] still advocate and promulgate political doctrines and principles without restriction."⁸⁷ When voters wishing to vote in other party primaries claimed the laws disfranchised them, the courts responded: "A hindrance to one, not a member of a party, from participating in the selection of the party's delegates and candidates, can in no proper sense of the word be said to interfere with the free exercise of the elective franchise."⁸⁸ The right to vote included the right to nominate, but only bona fide party members—as determined by the swearing of an oath—were entitled to participate in a given party's nomination procedures.

At first glance, it appears that here at least courts respected the associational character of political parties. If only bona fide party members were proper participants in that party's nomination processes, then the sense in which a party is a protected associational entity is strengthened. Yet the significance of this should not be exaggerated. Few powers are as important to an association as control over who can join and participate in its activities. Traditionally, party leaders—especially local bosses—dictated who could participate in party nomination practices. State-mandated affiliation oaths displaced the ability of the party leaders to set their own membership requirements, substituting the state legislature for party leaders. Furthermore, the affiliation oaths did little to ensure that only bona fide members of a party participated in its primary. Due to the secrecy of the Australian ballot, even members of other political parties could swear the oath with little fear of reprisal; the validity of the oath could never be verified (and, indeed, no reported cases of wrongful swearing of the oath could be found). So although the associational dimensions of political parties were recognized in the context of affilia-

84. See Merriam & Overacker, *supra* note 10, at 30–32.

85. *Drexel*, 105 N.W. at 179.

86. *Ladd v. Holmes*, 66 P. 714, 722 (Or. 1901).

87. *Id.*

88. *Drexel*, 105 N.W. at 179.

tion oaths, this did not translate into any right, freedom, or immunity from regulation for political parties.

F. The Political Thicket and the Limits of Voters' Rights

The expansive definition of voters' rights was not unlimited and its boundaries were marked by the unwillingness of courts to become entangled in the political thicket of intra-party disputes over party doctrine and ideology. As part of the turn-of-the-century electoral reform, state laws mandated nomination conventions, caucuses, and primaries, and established and distributed the voting power of delegates. Yet nomination meetings occasionally degenerated into factional party divisions, as groups of party members dissatisfied with how a convention was organized or with the likely candidates would quit the meeting hall and call a convention of their own to nominate a separate slate of candidates. A legal dispute would then arise over which group's candidates were entitled to run under the party banner. Judges complained of the "tendency in recent years to bring into the courts controversies concerning political party management,"⁸⁹ and expressed the "reluctance of the courts to enter upon an inquiry . . . into the question of fact as to which of two contending factions truly represents a political party."⁹⁰

State courts responded to these controversies not so much by looking to voters' rights, but by strictly adhering to the state-mandated rules of procedure for nomination activities. So long as procedural regularity was formally met, the courts refused to delve further into intra-party disputes. In part, this was due to the diminished fear of local party leaders' abuses; under state-mandated rules, the traditional grip of ward bosses over who would carry the party banner in the general election was loosened. Judges approved of the measures, consistent with their concern expressed elsewhere with the corruption of local party leaders. Yet even where party bosses reasserted themselves and their authority over the party nomination processes, state courts stayed out of intra-party disputes so long as the formal procedures required for nomination under state law were followed. These cases, which threatened to embroil judges in the messy job of sorting out which groups of party members were the "true" representatives of the organization, marked the outer boundary of the state courts' interest in parties' wrongs.

The strict adherence to procedural regularity was manifest in the Colorado Supreme Court's decision in *Whipple v. Broad*.⁹¹ At the Colorado Silver Republican Party's 1896 statewide convention, two rival groups formed and nominated their own slates of candidates when the party leadership, under the influence of the national Republican Party,

89. *State ex rel. Guion v. Miles*, 109 S.W. 595, 613 (Mo. 1908) (Valliant, J., dissenting).

90. *Baker v. Board of Election Comm'rs of Wayne County*, 68 N.W. 752, 754 (Mich. 1896).

91. 55 P. 172 (Colo. 1898).

abandoned support for the free coinage of silver. The free coinage of silver was not only the Colorado party's core reform, it defined the party to such an extent that it provided the party's very name.⁹² Yet over the objection of the genuine free silverites and a dissenting judge, the court refused to consider allegations that the national party had used "a faction of delegates" to "capture the party organization, abandon its fundamental principles and policy, and, under the guise of party action, turn it over to its political enemies."⁹³ The court looked only to whether the original convention was called and the voting conducted in accord with legal procedures, with no inquiry into party doctrine or the bad faith of party leaders.⁹⁴ The same reliance on procedural regularity guided the California Supreme Court in *Hutchinson v. Brown*.⁹⁵ When a majority of the 160 delegates attending the California People's Party's 1898 convention voted to fuse candidates with Democrats and Free Silver Republicans for the fall election—in violation of their pledges and against the advice of the executive committee—53 dissenting delegates adjourned to another room and nominated a genuine Populist slate. The California court compelled the Secretary of State to certify the slate of the original group of delegates, insisting that the law does not "demand[] . . . a ticket of Simon-pure Populists, but a ticket certified by the chairman and secretary of a regular Populist convention."⁹⁶ "The only question is which [certificate of nomination] emanated from the regular and authorized convention of the party."⁹⁷

The thorny questions of party doctrine and ideology led courts to look to procedural regularity when faced with disputes between competing slates of candidates. Outside of these clearly intra-party controversies, courts were guided by a framework that melded voters' rights with parties' wrongs as its primary emphasis. As reflected in decisions adjudicating the constitutionality of laws regulating internal party governance structures, ballot access, fusion, filing fees, candidate oath requirements, and affiliation oaths, the courts upheld ballot and party reforms to the extent they enhanced the right to vote—a right threatened by the corruption of party leaders.

II. UNDERSTANDING THE JUDICIAL RESPONSE TO PROGRESSIVE PARTY REGULATION

Moving beyond the traditional scholarly emphasis on twentieth century federal court adjudication of political party regulation reveals that

92. On "free silver" and the role of that issue in 1890s electoral politics, see Cousens, *supra* note 7, at 213; Paul Kleppner, *Continuity and Change in Electoral Politics, 1893–1928*, at 108 (1987).

93. *Whipple*, 55 P. at 175 (Goddard, J., dissenting).

94. See *id.* at 174–75.

95. *Hutchinson v. Brown*, 54 P. 738, 739 (Cal. 1898).

96. *Id.* at 740.

97. *Id.* at 739.

state courts were involved earlier in determining the validity of legislative efforts to control parties and their nominating processes. A close look at the state court cases indicates that judges rejected the claims of parties to be private voluntary associations entitled to immunity from regulation. Instead, state courts approached controversies over party regulation with a profound suspicion of party leaders—be they candidates or machine bosses—and an expansive conception of the right to vote, which incorporated nomination and an effective, meaningful, and useful balloting experience.

Questions remain as to how the judicial response to early state party regulation should be understood in light of contemporary electoral problems and scholarly debates. At the dawn of the twenty-first century, we have an entrenched two-party system⁹⁸ that may be partially attributable to the electoral reforms of the turn of the twentieth century.⁹⁹ Section A of this Part offers some answers as to why state courts countenanced regulations that ultimately helped to minimize electoral competition. Section B addresses questions about how the early judicial response to party regulation fits within current debates about political parties, the role of the courts in Progressive era reform, and national state-building.

A. Party Competition and the Spirit of Reform

A hundred years after the adoption of Populist and Progressive era reforms, with minor parties no longer vibrant political competitors, it is fair to wonder why courts failed to see how reforms, such as ballot access restrictions and fusion bans, served to entrench the two major parties. Yet, in historical context, it is easy to understand how the courts overlooked the duopoly-enhancing nature of many turn-of-the-century reforms.

The era was one of vibrant multiple party competition that included Populists, Free Silver Republicans, Gold Democrats, Socialists, Laborites, and Prohibitionists. These were not just marginal groups; they were often successful politically. In 1878, for example, the Greenback-Labor

98. See, e.g., Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans From Political Competition*, 1997 Sup. Ct. Rev. 331, 332 (critiquing the Supreme Court's refusal to "examine[] with care the premise that the two-party system is worthy of protection"); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643, 652–68 (1998).

99. Progressive electoral reform may have contributed to the entrenchment of the duopoly, especially regulations banning fusion, see Hasen, *supra* note 98 (discussing how fusion prohibitions help secure two-party dominance), but at most they were contributing factors to more influential features of the electoral system. According to Issacharoff and Pildes, building on the work of Maurice Duverger, the primary anticompetitive dynamic is the "first-past-the-post" regime of single-member, territorially defined electoral districts with plurality voting rules that push parties to the center of the political spectrum. See Issacharoff & Pildes, *supra* note 98, at 674–81.

Party won fourteen congressional seats. In the 1892 presidential election, the Populists received over one million popular votes (approximately ten percent) and twenty-two electoral college votes—the first electoral college votes received by any “third party” since the dual Democratic tickets of Douglas and Breckenridge in 1860.¹⁰⁰ In 1898, the Senate’s ninety members included six Silver Republicans and six Populists; the Populists held twenty-five seats in the House.¹⁰¹ “Minor” parties were playing a significant role in electoral politics, and trends indicated that role was growing.

The major political parties were far from stable, making entrenchment appear even more unlikely. In the mid-1890s, the Democracy disappeared altogether from the ballot in Colorado, Idaho, Kansas, North Dakota, and Wyoming, where the two-party system temporarily became the G.O.P. and the Populists.¹⁰² In 1896, the money issue divided both the major parties: Silver Republicans bolted to endorse the Democratic candidate, Bryan, and Gold Democrats ran their own presidential ticket.¹⁰³

Moreover, ballot and primary legislation was part of a late nineteenth century pattern of political reform that was expressly justified as diminishing partisanship in general and urban machines in particular.¹⁰⁴ Spirited by professionalization and bureaucratization, reformers sought to save a disorderly, partisan political system by advancing the values of efficiency, centralization, expertise, hierarchy, and stability.¹⁰⁵ Civil service reform robbed parties, especially local elites, of many of the patronage spoils that empowered them.¹⁰⁶ Municipal reform, tirelessly pursued by genteel reformers like Dorman Eaton, professionalized local governments and made them officially nonpartisan. The popular initiative, it was widely believed at the time, gave the people themselves the ability to legislate without having to work through corrupted parties. Party legislation was perceived not as partisan entrenchment, but as part of a larger movement of nonpartisan reform.

Particular reforms that seem a century later to be inhibitors of the growth of minor parties, such as petition requirements, were not at the time all bad for minor parties and independent candidates. Prior to the

100. See Cousens, *supra* note 7, at 168, 204, 212.

101. See *id.* at 270.

102. See Kleppner, *supra* note 92, at 61.

103. See Cousens, *supra* note 7, at 213–14.

104. See Wiebe, *supra* note 6, at 60 (“The patrician’s battle with the urban machine, projected beyond the city, was one part of a widespread demand to purify all political institutions.”).

105. See David P. Thelan, Two Traditions of Progressive Reform, Political Parties, and American Democracy, in *The American Constitutional System Under Strong and Weak Parties* 37, 38 (Patricia Bonomi et al. eds., 1981).

106. See Wiebe, *supra* note 6, at 61 (“The nonpartisanship inherent in civil service would permeate politics, and as party organizations withered away, the men of quality now excluded by the spoilsmen and unscrupulous businessmen would resume their natural posts of command.”).

official ballot which required limits on access, minor party candidates had to supply every potential voter with pre-printed ballots or pasters. For candidates in statewide races or seeking rural votes, substantial organization and financing was necessary on election day to cover the dispersed polling places.¹⁰⁷ Some advance distribution of tickets was possible, but minor party and independent candidates were then reliant upon voters (many illiterate and unable to vote by write-in) not to lose or forget their ballots. And there was tremendous inefficiency in that far more ballots had to be distributed than minor party or independent candidates could realistically hope to be cast in their favor. Democrats and Republicans, with their array of local organizations, were better able than minor parties and independents to surmount such hardships. Under a petitioning scheme, a minor party or independent candidate no longer needed a large organization on election day, but could, by himself or with a group of supporters, gather signatures over the course of several weeks or months. Minor parties or independents that earned access to the ballot could be sure, for the first time, that supporters would be able to vote for them on election day.

Although some reforms, such as fusion prohibition, were enacted of partisan spirit,¹⁰⁸ the extent to which they minimized party competition was far from clear. Judges were forced to rule on reforms almost immediately after enactment, with no time to see how they worked out in practice. When courts adjudicated reforms, the duopoly was not yet entrenched and there was little reason to suspect that the vibrant multiple party competition that characterized the post-Civil War era was decaying. And unlike courts of today, no state courts at the turn of the century explicitly justified upholding reforms as a way to maintain a two-party system.¹⁰⁹

Most judges, even those who could never be accused of Mugwumpism, could appreciate the way in which turn-of-the-century reforms stabilized electoral politics. Such reforms created a rationalized, systematic process of party nomination that fit the temperament of judges long accustomed to operating in an environment of procedural regularity, rou-

107. See Reynolds & McCormick, *supra* note 8, at 849–50.

108. On the partisan motivations behind fusion bans, see Argersinger, *supra* note 68. Some other turn-of-the-century reforms also were prompted by partisanship, not principle. For example, the first state-wide primary, held by Louisiana Democrats in 1892, was designed to unite its competing factions by rallying them behind a single candidate to run against the Republican-Populist opposition. See Kousser, *supra* note 29, at 74. Moreover, the fight against urban bosses was at least partially motivated by the desire of rural leaders to maintain their relative power over the cities, which due to migration were swelling with voters. Cf. Wiebe, *supra* note 6, at 176 (“State governments in the East were certainly not the cordial allies of urban progressivism. By a combination of custom, majority rule, and the gerrymander, they served as rural strongholds where the enemies of the city generally held sway.”). Even if state court judges were aware of these partisan underpinnings, but they did not offer any recognition of them in adjudicating the constitutionality of reforms.

109. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (accepting Minnesota’s governmental interest in preserving the two-party system).

tine, and proficiency. An electoral system that was once disorderly, decentralized, and violence-prone was transformed within the span of a decade into a more reliable, organized, procedurally-defined event. Added to the wide recognition of the transgressions of party leaders, the judicial inclination to favor clear, stable rules and order helped undergird the courts' approval of party regulation.

In practical terms, even courts resolutely hostile to regulation of parties, such as those in Illinois and California, were forced to accept core reforms. California's experience is illustrative. After the state Supreme Court in 1900 invalidated comprehensive primary legislation enacted the year before,¹¹⁰ the state assembly immediately added a new statute to the Political Code. In 1902, the court held that the new law also violated the state constitution.¹¹¹ When the court next confronted primary legislation, five years later, the judges could only throw up their hands in surrender;¹¹² the constitution itself had been amended "to meet and avoid the very objections to the primary law which this court found."¹¹³

B. *The Turn-of-the-Century Judicial Response and Current Scholarly Debates*

What does the early judicial approach to party regulation tell us about current scholarly debates? Although there is a range of scholarly debates to which the story told here might be relevant, this section focuses on three in particular: the tripartite breakdown of political parties; the role played by the courts in stymieing progressive reform; and the turn-of-the-century process of state-building.

Early party reforms call to mind the breakdown of party structure in twentieth party political party scholarship—the party in government (elected representatives of the party), the party organization (committed party elites who manage and run the operations of the party), and the party in the electorate (voters loyal to, or identifying with, the party).¹¹⁴ Interestingly, state court judges of the 1880s to 1910s did not recognize parties to have this tripartite structure. Rather, they approached party and ballot reform from a bimodal conception of parties, constituted by dubious elites that made up the party organization and often hapless voters of the party in the electorate. Bosses, candidates, and party officials remained undifferentiated, each viewed skeptically as the font of corruption, the very problem to be remedied. The other element of the party, the voters, was seen as the victim of elite corruption; reforms thought to render the electoral process more useful and reliable for voters were upheld.

110. See *Britton v. Board of Election Comm'rs*, 61 P. 1115 (Cal. 1900).

111. See *Murphy v. Curry*, 70 P. 461 (Cal. 1902).

112. See *Schostag v. Cator*, 91 P. 502, 503 (Cal. 1907) (approving the new legislation).

113. *Katz v. Fitzgerald*, 93 P. 112, 114 (Cal. 1907).

114. See, e.g., Frank J. Sorauf & Paul Allen Beck, *Party Politics in America* 7–13 (7th ed. 1992); Lowenstein, *supra* note 1, at 1754–60.

Due to this bimodal conception of parties, state court judges ignored the third faction recognized by current political party scholars: the party in government. As election law scholar Dan Lowenstein notes, "it is the parties that operate upon and actually constitute the government [W]hen the government 'regulates' the parties, to a very large extent the parties are regulating themselves."¹¹⁵ The courts' failure to account for the party in government had a profound effect on the jurisprudence of the era, for it made tenable the upholding of reforms based on suspicion of party leaders—even when the reforms themselves were the handiwork of elected party officials. This is not to say that courts could not have upheld the laws had they recognized the party in government, but they would have had to find a different justification for upholding legislation seen to emerge from intra-party disputes. The official ballot, party committee, and primary legislation could have been framed, for instance, as efforts by the party in government to displace the corrupt party organization—here, machine bosses—giving elected officials more direct, uninhibited access to the third constituent group, party voters. Nevertheless, state court judges perceived parties to be bimodal—party organization and party in the electorate—without accounting for the third faction of the political party, the party in government.

The activity of the courts—both upholding reforms and reasoning by way of voters' rights/parties' wrongs—also tells us something about the role of the courts in progressive reform. It has become conventional wisdom among scholars that turn-of-the-century courts served as an obstacle to reform as judges protected the powerful and their interests and ignored the common man.¹¹⁶ Yet the history of party and primary regulation suggests the inadequacies of describing the late nineteenth century judiciary, as Arnold Paul famously did, as "the principal bulwark of conservative defense"¹¹⁷ against reform. Although courts actively protected a sphere of contract and property rights from reform legislation, those same courts confirmed the validity of electoral regulation in the interests of progressivism and the common voter.¹¹⁸ The outrages of laissez-faire jurisprudence concerning economic regulation, symbolized in the U.S. Supreme Court's *Lochner* decision,¹¹⁹ should not obscure the ways in which courts did support governmental reform and did advance the in-

115. Lowenstein, *supra* note 1, at 1756.

116. See, e.g., Robert G. McCloskey, *American Conservatism in the Age of Enterprise* 84 (1951); Laurence H. Tribe, *American Constitutional Law* 568 (2d ed. 1988).

117. Arnold M. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887–1895*, at 2 (1976).

118. The Wisconsin Supreme Court aptly described the view of judges towards regulatory efforts in the field of election law: "Manifestly, the right to vote, the secrecy of the vote, and the purity of elections, all essential to the success of our form of government, cannot be secured without legislative regulations. Such regulations, within reasonable limits, strengthen and make effective the constitutional guaranties instead of impairing or destroying them." *State ex rel. Runge v. Anderson*, 76 N.W. 482, 486 (Wis. 1898).

119. *Lochner v. New York*, 198 U.S. 45 (1905).

terests of ordinary citizens over traditionally powerful groups, such as ward party bosses, in the realm of election law. Until it recognizes the role of the courts in approving electoral reform and enhancing voters' rights, the conventional wisdom of "conservative crisis" remains deficient.

The political party regulation adopted in the states also offers new insight on "state-building." Since the 1980s, historians and students of American political development have analyzed many facets of national state-building around the turn of the century, as the federal government created bureaucracies and enacted regulation to reign dominant over the localism of states.¹²⁰ Electoral reform both affirms the recognition of turn-of-the-century state-building and suggests that state-building was not merely a process that occurred on the national level. Through election laws, the several states also pursued state-building, creating and institutionalizing state-level bureaucracies and centralizing the authority of state governments.

Party reform, and the judicial response to it, were important elements of turn-of-the-century state-building, as legislatures transformed a chaotic, pervasively decentralized, privately-organized process of nomination and election into a reliable, public system integrated into the government bureaucracy. Just as civil service reform and railroad regulation rationalized and systematized public administration and interstate commerce, party reform did the same for the electoral process. Only in the realm of election law, state-building occurred not just at the national level, but also within individual states. Elections, unlike commercial activity, remained firmly under the aegis of the states instead of the federal government; hence, it was at the level of states that much of the institutionalization of electoral politics occurred. As on the national level the effect of state-building was to centralize authority away from inconsistent, vicissitudinous local authorities. Only here the localities were not states, but cities, districts, and wards, and the centralizing tendency consolidated instead of diminished the role of state governments.

These are but brief suggestions as to how turn-of-the-century party and primary reform fits within a few scholarly debates. Certainly, these reforms and the judicial response thereto have relevance to other debates and issues. As we have seen here with regard to the tripartite breakdown of parties, the role of the courts as an obstacle to reform, and the turn-of-the-century state-building, the story of the early political party regulation poses challenges to dominant assumptions and the conventional scholarly wisdom.

120. See generally Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics* (1988) (analyzing the emergence of the national regulatory state and showing how it redefined the relationship between government and the market); Skowronek, *supra* note 3, at 4 (analyzing how the "new American state" displaced "well-articulated governing arrangements" in favor of "national governmental capacities").

CONCLUSION

Contrary to the Populist and Progressive era jurisprudence, late twentieth century courts and scholars tend to characterize political parties as associations with at least some modicum of privacy and immunity from state regulation.¹²¹ Yet it is little wonder that courts earlier in the century, including the U.S. Supreme Court in the White Primary cases,¹²² had difficulty framing the parties as purely private associations. As early as 1903, legal commentators argued that state primary, ballot, and party reforms were based on "the fact that a party is not a mere voluntary association but a political organ and as such should be recognized and controlled by law."¹²³ Parties enjoyed merely the right "to exist," according to one; "whatever degree of self-control" that right "calls for and nothing more must be respected."¹²⁴ By the time the federal courts began to decide political party cases, the view of parties as associations had been under steady attack for several decades. The political scientists Charles Merriam and Louise Overacker concluded in 1928, "The claims of the party as a voluntary association to regulate its own affairs have been completely broken down."¹²⁵

In its place stood an approach to party regulation that rested on the rights of voters—to participate in party nomination, to elect the candidates of their choice, and to an orderly electoral process. To the extent the party was an association, the courts were concerned primarily with individuals' ability to join and vote, not with organized leadership's autonomy. Indeed, courts were skeptical of party leaders, such as the local machine bosses like Richard Croker of Tammany Hall and George B. Cox in Cincinnati, who were thought to be the source of corrupt elections. It was through this framework of voters' rights and parties' wrongs that court judges determined the constitutionality of party and primary reform.

The current electoral environment faces few of the problems confronting late nineteenth century reformers. Despite the recent example of the New York Republican Party's ill-fated attempt to keep insurgent Senator John McCain off its presidential primary ballot, party elites are rarely the corrupting forces of old. The electorate is more educated and

121. See, e.g., *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (affirming the associational rights of political parties); James S. Fay, *The Legal Regulation of Political Parties*, 9 J. Legis. 263, 275–76 (1982) (arguing that parties should be viewed as private organizations protected by First Amendment freedom of association principles); John G. Kester, *Constitutional Restrictions on Political Parties*, 60 Va. L. Rev. 735, 777–81 (1974) (same); Clifton McClesky, *Parties at the Bar: Equal Protection, Freedom of Association, and the Rights of Political Organizations*, 46 J. Pol. 346, 351, 354–61 (1984) (analyzing Supreme Court precedent establishing a free association right for political parties).

122. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Herndon*, 273 U.S. 536 (1927).

123. Tuttle, *supra* note 32, at 469.

124. *Id.* at 495.

125. See Merriam & Overacker, *supra* note 10, at 118.

capable of handling information; thus, it remains an open question whether early electoral reforms still serve to protect voters from confusion. We have instead a new host of issues to deal with that call into question the role of political parties in democratic governance. Minor parties have become occasional spectacles instead of vibrant competitors, campaigns are candidate-centered, voters have diminished party loyalty, and the presidential nominating system is skewed so that races are effectively over after only a handful of states have held their primaries or caucuses. Resolving these issues may require a new reconceptualization of the right to vote and of the nature of party associational rights, similar in spirit and ambition to that of reformers at the turn of the last century.

